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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 270 **71 - 279**

PALLADIO, INC.,

Petitioner,

against

HENRY A. DIAMOND, as Commissioner of the Department of Environmental Conservation of the State of New York, DON J. WICKHAM, as Commissioner of Agriculture and Markets of the State of New York, JOHN P. LOMENZO, as Secretary of State of the State of New York, FRANK S. HOGAN, as District Attorney of New York County, and HOWARD R. LEARY, as Police Commissioner of the City of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Opinions Below

The opinion of the District Court (MANSFIELD, D. J.) denying petitioner's motion for a preliminary injunction and the convening of a three-judge court is reported at 321 F. Supp. 630. The opinion of the Court of Appeals unanimously affirming the District Court is reported at 440 F. 2d 1319. Such opinions are reproduced at pp. A1 and A12, respectively, of the Appendix to the Petition for Writ of Certiorari.*

* References to the said appendix are designated "A—".

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Is there a substantial question whether Agriculture and Markets Law § 358-a operates in a field preempted by Congress, unconstitutionally interferes with the federal government's conduct of foreign affairs or unconstitutionally deprives petitioner of property without due process of law?

   The Court below held that there is not.

2. Is § 358-a a valid exercise of the State's police power?

   The Court below held that it is.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the Constitution (Art. I, Sec. 8, Cl. 3, Art. II, Sec. 2, Art. VI, Cl. 2 and Art. XIV, Sec. 1), the New York Agriculture and Markets Law, and the Endangered Species Conservation Act (P.L. 91-135; 83 Stat. 275) are set forth in the petition, pp. 3-4 and A16-35.

Statement of the Case

This petition challenges the validity of the New York statute which was sustained in *A. E. Nettleton Co.* v. *Diamond,* 264 N.E. 2d 118, 27 N.Y.2d 182 (1970), app. dism. *sub nom. Reptile Products Assn.* v. *Diamond,* 401 U.S. 969, the Mason Act (§ 358-a of the Agriculture and Markets Law), which was enacted by the 1970 New York Legislature to deal with a problem of the most serious nature—

the decimation of certain already endangered species of animals, at such accelerated rates as to lead to their virtually certain extinction unless remedial steps be promptly taken. It is recognized today by the overwhelming preponderance of reputable scientific authority that the extinction of any entire species of mammal, reptile or bird may have severely detrimental ecological effects, altering the balance of nature and in many instances leading to an overabundance of insects and other pests which would otherwise be eaten by the eliminated species. It is recognized in addition that nature knows no political boundaries and that the effects of these changes on the environment may, and frequently do, transcend state and national boundary lines.

It was for these reasons that Federal legislation was enacted in 1966 (16 U.S.C. §§ 668aa, *et seq.*) in which Congress expressly found "that serious losses in [certain] species of native wild animals with educational, historical, recreational and scientific value have occurred and are occurring" and declared it to be Congressional policy to protect such endangered species.

Thereafter Congress extended this protection to world-wide species threatened with extinction in the Endangered Species Conservation Act of 1969 (P.L. 91-135; 83 Stat. 275) which forbids importation of species found by the Secretary of the Interior to be "threatened with world-wide extinction" as well as the interstate transportation of wildlife taken in violation of national, state or foreign laws. Pursuant to this Act, the Secretary of the Interior prepared an "endangered species list" of wildlife "deemed to be threatened with world-wide extinction" (50 CFR § 17.11). Importation of such species is forbidden (*id.* § 17.10).

Because conservation and specifically the regulation of fish and animals are traditionally the responsibility of the states under our federal system, and because Congress

plainly did not purport to preempt the field but rather devolved responsibility for preparing a list of threatened species with the Secretary of the Interior, leaving ample room for the operation of state laws, the New York Legislature, in recognition of New York's concern over the imminent extinction of these endangered species, enacted the challenged statute explicitly prohibiting the sale or offer for sale within New York of products made from the skins of certain specified animals threatened with extinction, including leopard, tiger and "alligators, caiman or crocodile of the Order Crocodylia."

Proceedings Below

The District Court (MANSFIELD, D.J.) found that the petitioner failed to raise a substantial federal question. It aptly noted (A1) that it is "now generally recognized that the destruction or disturbance of vital life cycles or the balance of a species of wildlife, even though initiated in one part of the world, may have a profound effect upon the health and welfare of people in other distant parts." The Court found no conflict between the Mason Act and federal legislation, holding that "[t]he state's list of endangered species may be broader than the federal list simply because the State Legislature did not see fit to wait until only a handful of species remained before it passed a law affording protection" (A6). The Court noted that although experts may disagree on the subject of which species may be endangered, the Legislature's well-documented finding in this regard may not be disturbed on judicial review (A8).

The Court considered petitioner's contention that it is possible for "persons engaged in the trade" to distinguish between the processed skins of the federally listed species and other species, pointed out that the expert testimony before the State was otherwise, and held that the Legislature could reasonably have adopted the latter view (A8). The Court added that even if petitioner's contention were

accepted, "it was appropriate for the legislature to protect all Crocodylia in order to prevent successive extermination of various species" (A8).

The Court found "ample evidence of vital non-aesthetic interests on the part of the state which justify its exercise of its broad police powers to discourage the extinction of foreign Crocodylia" (A9-10). It referred to an affidavit of William Conway, General Director of the New York Zoological Society and Park, to the effect that the extinction of commercial species would impair the opportunities for employment of New York workers who process pelts and that protection of the animals would give them time to repopulate (A10).

The Court found "no inconsistency or conflict between the recently enacted Federal Act * * * and the Mason Act" (A10) and pointed out that the Federal law "explicitly recognize[s] the role of the states." Finally, it rejected the claim that § 358-a violates the Due Process Clause (A11) and denied a motion for a preliminary injunction and a three-judge court since no substantial Federal question was presented.

The Court of Appeals affirmed in a *per curiam* opinion, relying substantially on the opinion of Judge MANSFIELD and on the decision of this Court in *Reptile Products Assn.* v. *Diamond*, 401 U.S. 969 (*infra*).

Reasons for Denying Certiorari

A.

Petitioner's attacks on this statute fall far short of overturning the powerful presumption of its constitutionality. The incredible claim that the decision of the New York Court of Appeals in *A. E. Nettleton Co.* v. *Diamond, supra*, app. dism. *sub nom. Reptile Products Assn.* v. *Diamond*, 401 U. S. 969, is incorrect and irrelevant

may be quickly disposed of. That case involved challenges to the same statute here involved on virtually identical grounds. New York's highest court rejected these claims and upheld the law on all counts, and this Court dismissed the appeal from that order. Petitioner's attempt to invent "crucial differences" between that case and this is ludicrous.

Similarly, petitioner's arguments on the factual questions of the degree of difficulty in distinguishing between the skins of endangered and non-endangered species and on the practices of the hide industry in regard to the utilization of various species should have been addressed to the Legislature. The Legislature held comprehensive hearings on this matter at which the testimony of distinguished biologists and zoologists was elicited that the enumerated species are threatened with extinction. Petitioner's disagreement with the legislative finding does not invalidate it. As the Court below held (A-7), "If the experts disagree—and apparently they do, * * * the legislature has the right to accept one line of authorities rather than another."

The contention that Congress has preempted the field of wildlife preservation is utterly insubstantial. Preemption occurs only where there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area [or] evidence of a congressional design to preempt the field." *Florida Lime & Avocado Growers* v. *Paul*, 373 U. S. 132, 141. No such preemption could possibly be inferred from the pattern of federal and state regulation of wildlife conservation, a field historically reserved to the states.

Petitioner has completely failed to meet its burden of showing that compliance with both Federal and State regulations would be a physical impossibility for a person engaged in interstate commerce. The mere fact that the

Mason Law includes some species which are not on the current Federal Endangered Species List does not establish such impossibility (See *Swift & Co.* v. *Wickham,* 230 F. Supp. 398, 406 [D.C.N.Y. 1964], cert. den. 385 U. S. 1036; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 162).

The Court below correctly held that "[t]here is no inconsistency or conflict between the recently enacted Federal Endangered Species Conservation Act of 1969 * * * and the Mason Act" (A-10). The record "demonstrates no inevitable collision between the two schemes of regulation, despite the dissimilarity of the standards." *Florida Lime Growers, supra,* at page 143. As the New York Court of Appeals held in rejecting this claim, "there has been no showing that compliance with both the Federal and State law is an impossiblity * * * [n]or has it been demonstrated that the Mason Law could not be enforced without impairing the effectiveness of the Federal Act," 264 N. E. 2d 118, 122.

Moreover, the preservation of wildlife is not a subject matter which by its very nature admits only of exclusive federal regulation. As the New York Court of Appeals noted (*id.*), "it is almost axiomatic that wildlife conservation has been a matter traditionally left to the states (See *Barrett* v. *New York* [116 N. E. 99, 100], 220 N. Y. 423)." It is a subject which neither inherently requires national supervision nor demands exclusive federal regulation in order to achieve uniformity vital to national interests. The Courts have repeatedly upheld state laws dealing with the possession and sale of game, hides and furs. See *Swift & Co.* v. *Wickham, supra; Bayside Fish Co.* v. *Gentry,* 297 U. S. 422 (upholding California's restrictions on processing of fish brought from other states); *People ex rel. Silz* v. *Hesterberg,* 211 U. S. 31 (sustaining a New York law prohibiting the possession of game within the state during the closed season, regardless of whether the animal was lawfully taken in a foreign state or country); *Salasnek*

Fisheries, Inc. v. *Cashner*, 224 N. E. 2d 162, 9 Ohio App. 2d 233 (1967) (upholding a statute forbidding the taking or possession of perch of less than a certain size, which applied to importation of perch caught outside the state). Indeed, the Federal Act itself specifically provides for the enforcement of state laws. The New York Court of Appeals correctly held that "[t]he Industry has not shown that wildlife conservation is a matter exclusively within the sphere of Federal competence." 264 N. E. 2d at 122.

Congress has indicated not the slightest intention that state action should be excluded in this field. Federal displacement of the "historic police powers of the State" should not be decreed "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218. Petitioner's insistence here that since the Federal Act is detailed and specific, it establishes the Congressional purpose to preempt State action in the area (Brief, p. 12) is completely belied by a reading of the statute. As this Court has held, "[t]he validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation * * *." *Head* v. *New Mexico Board*, 374 U. S. 424, 429. As New York's highest court pointed out, 264 N.E.2d at 122, "the Federal statute specifically provides for the enforcement of state laws such as the Mason Law."*

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* Section 7(a)(2) of the Act makes any person who "* * * sells or causes to be sold in interstate or foreign commerce *any wildlife taken, transported, or sold in any manner in violation of any law or regulation of any State or foreign country*" or who (b)(2) "sells or causes to be sold in interstate or foreign commerce any products manufactured, made or processed from *any wildlife taken, transported or sold in any manner in violation of any law or regulation of a State or foreign country* * * *" subject to the enforcement provisions of the act, including a fine of up to $5,000 for each violation (emphasis supplied). Furthermore, the regulations promulgated by the Secretary of the Interior which preceded the Federal Endangered Species List provide that "[n]othing in this part * * * shall be construed to relieve any person from any provision of any other laws, rules or regulations of the States or the United States." 50 CFR § 17.16, 35 Fed. Reg. 8495.

Hines v. *Davidowitz*, 312 U. S. 52 and *Zschernig* v. *Miller*, 389 U. S. 429, are not helpful to petitioner. *Hines* v. *Davidowitz* involved a Pennsylvania statute requiring aliens to register and carry an identification card. The following year Congress passed the Federal Alien Registration Act. The Court held (p. 66) "the regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject, 'the act of Congress * * * is supreme; and the law of the State * * * must yield to it.'" There can be no suggestion that the conservation of wildlife is so "intimately blended and intertwined" with the interests of the Federal government that Congressional action will be deemed preemptive of state power in this field. And *Zschernig* v. *Miller* is completely dissimilar to the case at bar since it was held to be an attempt by a state to involve itself in the conduct of foreign policy.

The language of the Federal Endangered Species Act is completely inconsistent with "an unambiguous congressional mandate" to preclude state action to regulate the sale of hides and skins. *Florida Lime Growers, supra,* at page 147. As the Court below held, "the Endangered Species Act invites state action" (A-11).

B.

The Mason Act is a valid exercise of the state's police power and is in no way violative of due process. As the Court below held (A-11), appellant "has no property right in the wildlife of foreign countries, and the mere loss of profits is not a basis for declaring the state laws unconstitutional." See *Nebbia* v. *New York*, 291 U. S. 502, 523; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 424; *Breard* v. *City of Alexandria*, 341 U. S. 622, 632. The Constitution does not guarantee an absolute right to en-

gage in a business to the extent that it conflicts with the public interest. *Staten Island Loaders* v. *Waterfront Commission*, 117 F. Supp. 308, 311 (D.C.N.Y., 1953), aff'd 347 U. S. 439, reh. den. 347 U. S. 994. As this Court held in *Berman* v. *Parker*, 348 U. S. 26, 33, "The concept of the public welfare is broad and inclusive. • • • The values it represents are spiritual as well as physical, aesthetic as well as monetary."

New York clearly has a legitimate interest in taking steps to halt the extinction of the species enumerated in the Mason Law, regardless of whether or not they are native to the state.* As the Legislature stated in enacting § 187 of the Conservation Law (the Harris Act, a companion to the Mason Act, challenged and upheld in the District Court and not involved here):

> "The legislature of the state of New York hereby finds that the protection of endangered species of wildlife is a matter of general state concern. • • • The states • • • must assume the responsibility of restricting the transportation, possession and sale of these species within their respective jurisdictions to assure the continued survival of many of the nation's endangered

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* There is specific historical precedent in New York for statutes prohibiting sale or possession for sale of hides or articles made from endangered animals. In 1909 the Legislature enacted what is now Conservation Law § 346. It prohibits the sale, or possession for sale, of "any part of the plumage, skin or body of any wild bird or unlisted domestic bird, whether taken within or without the state," with listed exceptions. "Wild bird" and "unlisted domestic bird" include "every kind of bird, regardless of origin," except for those expressly excluded (domestic fowl, pheasant, duck, pigeon and the like). That statute goes further than the law here involved. It makes possession of plumage in a store, warehouse or factory "presumptive evidence of illegal possession for sale." The section was enacted to protect from extinction the egret, whose plumage was then fashionable in ladies' hats. In six decades it has never been challenged, and in that period the egret has been saved from almost certain extinction.

> species of fish and wildlife. The legislature hereby finds that by eliminating the market for these species in New York State, the potential for their continued existence will be strengthened."

Animals are a resource of the entire world and know no political boundaries. As long as a market for their skins and hides existed in New York, a center of this industry, no amount of local regulation by the states and countries where the endangered species are found could effectively save them from extinction, since such laws are rendered unenforceable by the vast expanses of territory and scarcity of personnel involved, and by the extraordinary value of the hides to gangs of poachers. Thus the Mason Act is the only practical alternative to a confession of impotence to deal with this situation.

There is no support for petitioner's claim that the Federal Endangered Species List is entirely dispositive of the question of which species of animal are threatened with extinction, and it is simply untrue that the Secretary of the Interior has found "5 species and one subspecies [of the order crocodylia] * * * to be endangered" and that the remaining species and subspecies are in abundant supply (Brief, p. 6). Neither the language of the Federal Act nor that of the Secretary of the Interior indicate that his list is final and definitive. As the District Court held, "[t]he state's list of endangered species may be broader than the federal list simply because the State Legislature did not see fit to wait until only a handful of species remained before it passed a law affording protection. We cannot overrule the legislature for being cautious. Extinct animals, like lost time, can never be brought back" (A-6).

The protection of animals facing the threat of extinction was plainly a valid subject for legislative consideration. "The State is interested not merely in the preservation of

specimens for museums but in conserving and perpetuating a constant supply." *Corsa* v. *Tawes,* 149 F. Supp. 771, 774 (D. C. Md. 1957), aff'd 355 U. S. 37. In that case, sustaining Maryland's restrictions on taking of ocean fish beyond its waters, the three-judge Federal court held (p. 775):

> "Where should these conflicts be resolved? Certainly the courts are not an appropriate forum. These matters are peculiarly legislative in character, and not within the judicial sphere."

Here, the Legislature held lengthy hearings at which testimony of distinguished biologists and zoologists was elicited that the enumerated species are threatened with extinction. These legislative findings are not properly the subject of judicial review. See *Katzenbach* v. *Morgan,* 384 U. S. 641, 653:

> "It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the congress might resolve the conflict as it did."

It is basic that the wisdom of, or necessity for, a statute is beyond the scope of judicial review. *Ferguson* v. *Skrupa,* 372 U. S. 726, 730.

C.

The statute in no way interferes with the federal government's right to conduct foreign affairs, nor does it hinder the "international cooperation" referred to in the federal act. The Secretary of State retains full authority to enter into treaties or conservation agreements with foreign governments. Even if hypothetically such a treaty were to deal with the *importation* into the United States of a species listed in the Mason Act, no conflict could conceivably arise as to *sales* within the state. In any event, there is no such present issue.

Petitioner's challenges to this statute were properly regarded as insubstantial.

CONCLUSION

For the foregoing reasons the instant petition for a writ of certiorari should in all respects be denied.

Dated: New York, New York, October 15, 1971.

Respectfully submitted,

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